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No. 00-1680

In The
Supreme Court of the United States

PACIFIC BELL TELEPHONE COMPANY, a California corporation, and PACIFIC TELESIS GROUP, a Nevada corporation,

Petitioners,

vs.

NANCY WAYNE; MARY ANN ACALDO; BARBARA GARVIN; KAREN KENDRICK; DORIS RYAN; and CAROL JANE TIDWELL,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITIONERS' REPLY BRIEF

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I. INTRODUCTION

Respondents fail to refute nearly all of the arguments made by petitioners to show the serious consideration disclosure requirement interferes with collective bargaining, *i.e.*, it interferes with an employer's right to bargain freely and deprives employers of concessions they are entitled to reserve for the bargaining table by requiring disclosure of employers' bargaining strategy before bargaining begins; it interferes with and undermines the union's role by causing employees to believe there is no need for a collective bargaining agent; it stifles employers' preparations for bargaining and consideration of alternatives for improved benefits; and it can confuse and mislead employees as well as hurt them by discouraging employer proposals to improve benefits. They also fail to refute that applying the requirement to union members does not further any ERISA policy because the employees are imputed to have knowledge of the proposed benefits changes by virtue of their agency relationship with the union. Instead, respondents simply rely on the Ninth Circuit's bald assertion that the requirement does not interfere with collective bargaining and ignore the many Circuits who have warned it can. Respondents also fail to address petitioners' argument that the disclosure standard cannot be met because an employer may not implement a change in plan benefits without union approval.

Respondents wrongly argue there is no Circuit split concerning the Ninth Circuit's holding that a misrepresentation about a future enhanced ERISA benefit made prior to "serious consideration" can establish a breach of fiduciary duty because unlike here, there were no "misrepresentations" in the cases upon which petitioners rely to show the conflict. There were misrepresentations in those cases similar to those alleged here, and the other Circuits

found they could not establish a breach of fiduciary duty because they were made prior to serious consideration. The conflict is ripe because a reversal will determine what alleged misrepresentations are at issue. A reversal will also resolve the entire case if all of the alleged misrepresentations occurred prior to serious consideration. In addition, the Ninth Circuit's ruling has created law for use in future cases that is contrary to the law of most Circuits.

For the reasons stated, the question of whether the serious consideration disclosure requirement should be applied in the collective bargaining context is a question of broad national importance that this Court should address.

II. RESPONDENTS DO NOT REBUT PETITIONERS' EXAMPLES OF HOW THE SERIOUS CONSIDERATION DISCLOSURE REQUIREMENT INTERFERES WITH COLLECTIVE BARGAINING AND THEIR CLAIM THAT THERE IS NO INTERFERENCE IS BASED ON DEMONSTRABLY INCORRECT ASSERTIONS.

A. Respondents are Incorrect in Asserting that Other Courts have Applied the Disclosure Requirement in the Collective Bargaining Context.

Contrary to respondents' contention, no other court has applied the disclosure requirement in the context of collective bargaining. *See* Resp. Opp. at 10-12. *Bins v. Exxon Co. U.S.A.*, 220 F.3d 1042 (9th Cir. 2000) (*"Bins II"*) and *Fischer v. Philadelphia Elec. Co.*, 96 F.3d 1533 (3d Cir. 1996), *cert. denied*, 520 U.S. 1116 (1997) (*"Fischer II"*) are inapposite because neither involved union employees. Although *Drennan v. General Motors Corp.*, 977 F.2d 246 (6th Cir. 1992) and *Adamczyk v. Lever Bros. Co.*, 33 F. Supp 2d 679 (N.D. Ill. 1998) involved union employees, they are distinguishable because neither involved collective bargaining. In *Drennan*,

the ERISA plan about which the employees had inquired was already in effect and the employer could, with union assent, elect to offer it to those employees who met certain requirements. *Drennan*, 977 F.2d at 248-52. Thus, the employer was not in the position of having to bargain with the union about whether the plan inquired about should be adopted or about what the terms of the plan should be. In *Adamczyk*, the court concluded the serious consideration standard did not conflict with NLRA prohibitions because the misrepresentations had occurred *after* an initial agreement had been reached with the union. *Adamczyk*, 33 F. Supp. 2d at 687.

B. Respondents are Incorrect in Asserting that the Ninth Circuit's Opinion does not Require Substantial Disclosure and that the Impact of the Ninth Circuit's Opinion on Bargaining is Speculative.

Respondents incorrectly assert the Ninth Circuit's opinion does not require disclosure of the details of employer proposals under consideration and that Pacific therefore could have informed them only that an enhanced early retirement benefit was under consideration. Resp. Opp. at 13-14. Contrary to their contention, the Ninth Circuit held an employer must "'respond completely and truthfully about the present state of affairs" and must communicate "'the potential amendment accurately and straightforwardly.'" *See* App. A at 3a, 14a (*citing Bins II*, 220 F.3d at 1048, 1053).

Therefore, it is not "pure speculation" that disclosing the possibility of a future early retirement benefit package to a small group of employees would interfere with Pacific's ability to participate effectively in bargaining.[1] Respondents inquired about the possibility of better early retirement plans before collective bargaining began. Resp. Opp. at 3, 6-7, 21.

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[1] *See* Resp. Opp. at 13.

Thus, by adhering to the Ninth Circuit's ruling, Pacific would have been forced to disclose before bargaining details of the several early retirement plans it considered for bargaining that may never have been proposed to the Union and thereby would have been forced to give up its right to bargain freely. *See NLRB v. Insurance Agent Int'l. Union*, 361 U.S. 477, 488-89 (1960); *New York News, Inc. v. State of New York*, 745 F. Supp. 165, 168 (S.D.N.Y. 1990) (compelling parties to set forth "their bargaining positions" will render them "unable to 'be fluid and change positions or make concessions without embarrassment or losing face'").

Respondents do not dispute these consequences. Nor do they dispute that a union can obtain an employer's bargaining strategy simply by having potentially affected employees ask what benefit changes are being considered and thereby effectively deprive employers of the ability to develop any kind of confidential bargaining strategy.

C. Respondents Do Not Refute that the Disclosure Requirement Will Undermine the Union's Role in the Eyes of its Members.

Without any basis, respondents argue that if Pacific had disclosed to them the details of the early retirement benefits it was considering negotiating with the Union, the Union's position would not have been undermined if no new early retirement benefit was agreed upon. This argument ignores common sense. If Pacific revealed it was considering a better early retirement plan and none subsequently appeared in the new union contract, a likely consequence is that the employees would have blamed the Union.

D. Respondents Ignore the Complexities of Bargaining.

Without any factual basis, respondents contend that "[t]he issue to be resolved through collective bargaining was

not whether there would be an enhanced early retirement plan, but merely how much the pension band would be increased and how much of a cash incentive would be offered," that "the company knew a cash incentive was going to be a component in any future early retirement benefit acceptable by the union," and that "Pacific knew at the time that the Respondents were considering early retirement that it was likely an enhanced early retirement benefit, in some form, would be available to them." Resp. Opp. at 7-8, 14.

As noted by the district court, Pacific did not know these things[2] and the facts are contrary. During collective bargaining, Pacific proposed converting to a Cash Balance Pension plan, which would have changed the basic plan design and given employees not yet close to retirement age more opportunity to leave with larger accrued pension benefits. It was a completely different alternative than the ERB approach. It would have affected different employees and it did not include any kind of early retirement cash incentive. Moreover, the collective bargaining process is a series of tradeoffs and no proposal is examined in isolation. Indeed, a central principle of collective bargaining is that no term of a collective bargaining agreement is final until agreement is reached on all terms and negotiations have closed. *See, e.g., United Indep. Flight Officers, Inc. v. United Air Lines, Inc.*, 756 F.2d 1262, 1269 (7th Cir. 1985). Thus, until agreement on all of the terms of the contract was reached, all agreements between Pacific and the Union on particular subjects were tentative. Accordingly, a final agreement on an early retirement benefit depended not only upon the terms of the plans being proposed, but also upon the many other subjects that were being collectively bargained. It was only through the process of collective bargaining, after proposals and counterproposals had been put on the table, that Pacific

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[2] *See* App. B at 18a.

and the Union came to an agreement on an enhanced early retirement benefit plan (the ERB).

In addition, respondents attribute more knowledge to their supervisors than they had. Pacific and the Union had made an agreement not to disclose bargaining proposals outside of the bargaining table. Thus, when respondents inquired about future early retirement plans, their supervisors had no knowledge of the plans Pacific considered proposing in bargaining.

E. Respondents Do Not Refute that the Serious Consideration Disclosure Duty Will Likely Mislead and Hurt, Rather than Educate or Help, Union Employees.

Respondents argue that disclosing the possibility of improved retirement benefits to potentially affected employees "would have helped potentially affected employees make informed decisions." Resp. Opp. at 14. This argument fails to consider that uncertain information can mislead and hurt employees. For example, had Pacific made the disclosures required by the Ninth Circuit's standard, some employees might have declined the ERI Phase II offer based on a false assumption that a better early retirement plan would be offered to them in the future. Although the Union and Pacific agreed to the ERB, they also agreed Pacific could select the work groups to which it would offer the ERB, i.e., that it would not be offered to all employees to whom the ERI Phase II has been offered.

F. Respondents Do Not Refute that the Disclosure Requirement Does Not Further any ERISA Policy in the Context of Collective Bargaining.

Respondents correctly point out that the NLRA does not legislate that an employer's fiduciary obligations under ERISA are suspended during a collective bargaining process.

Resp. Opp. at 10. That, however, is not the issue. The question petitioners ask this Court to address is whether an employer's fiduciary duties require it to disclose potential changes to ERISA plans in the context of collective bargaining. It is a matter of defining the extent of the employer's duties, not suspending them.

Under ERISA, a fiduciary is generally not required to disclose changes in a benefit plan before it is adopted because "Congress' main purpose in imposing a disclosure requirement on ERISA fiduciaries was to ensure that 'employees [would have] sufficient information and data to enable them to know whether the plan was financially sound and being administered as intended.'" *Muse v. IBM*, 103 F.3d 490, 494 (6th Cir. 1996), *cert. denied*, 520 U.S. 1240 (1997) (citation omitted). The serious consideration disclosure requirement is an "exception" to this general rule to ensure that plan beneficiaries are protected from being blindsided by employer actions that are unilaterally and secretly implemented. *See, e.g., Bins II*, 220 F.3d 1042; *Fischer II*, 96 F.3d 1533. However, unilateral employer action is not a concern and is in fact a legal impossibility with respect to a benefit plan that is a mandatory subject of collective bargaining -- an argument respondents do not refute.

Nor do respondents refute that disclosure is unnecessary to further ERISA policy because the union, as the chosen bargaining agent, is charged with protecting its members' interests and the union's knowledge is imputed to its members under the law of agency. *See, e.g., Peel v. American Fidelity Assurance Co.*, 680 F.2d 374, 378 (5th Cir. 1982). *See also Morrow Crane Co. v. Affiliated FM Ins. Co.*, 885 F.2d 612, 614 (9th Cir. 1989) (principal is deemed to know what agent knows concerning matters in which agent has power to bind principal). Thus, when an employer proposes a change in benefits to the union, the employees have the

knowledge they would have obtained under the disclosure requirement.

Furthermore, respondents wrongly assert that petitioners are asking for NLRA policies to trump ERISA policies. Petitioners believe NLRA policies are as important as ERISA policies and are asking this Court to balance them appropriately. The Ninth Circuit's opinion essentially eviscerates the policies of the NLRA by requiring employers to disclose their bargaining strategy before bargaining even begins. Contrary to the Ninth Circuit's inference, ERISA is not more important than the NLRA.

G. Respondents Do Not Refute that the Serious Consideration Disclosure Standard Cannot Be Met in the Context of Collective Bargaining.

Respondents do not address petitioners' argument that the standard for meeting serious consideration, which requires that the proposal to change plan benefits be discussed "for purposes of implementation" by "senior management with the authority to implement the change," cannot properly be applied in the collective bargaining context because an employer may not implement the change in plan benefits without union approval. Rather, they merely conclude the disclosure requirement can be met because the Ninth Circuit found in this case that serious consideration began, at the latest, when Pacific tendered a proposal to the union during collective bargaining. In essence, respondents conclude the requirement can be met because the Ninth Circuit said so. Such circular reasoning is unpersuasive.

II. THERE IS A SPLIT AMONG THE CIRCUITS ABOUT REPRESENTATIONS MADE PRIOR TO "SERIOUS CONSIDERATION" ESTABLISHING BREACH OF FIDUCIARY DUTY.

A. The Misrepresentations in the Conflicting Cases are Similar to those Alleged Here.

In this case, the Ninth Circuit held that an employer can breach its fiduciary duties under ERISA by actively misinforming plan beneficiaries about whether there is a possibility of improved retirement benefits "'whether or not it is seriously considering future plan changes"' and even when the speaker "does not know whether it is true or not." App. A at 12a-13a. In arguing this rule of law does not conflict with the majority of other Circuits, respondents take language out of context to infer there were no misrepresentations in them similar to those alleged here. That is not so.

For example, in *Muse*, before the plaintiffs agreed to retire under an early retirement plan, they asked whether a better plan would be offered in the future and, based on their supervisors' "negative response," accepted early retirement. *Muse*, 103 F.3d at 492. After the plaintiffs retired, their employer offered an early retirement plan similar to that which the plaintiffs had inquired about. In conflict with the Ninth Circuit's opinion in this case, the Sixth Circuit held that "misrepresentations made *before* serious consideration" do not trigger fiduciary duties and therefore cannot be the basis for establishing a breach of fiduciary duty claim under ERISA. *Id.* at 494. Thus, the court held there was insufficient evidence to establish the employer "knowingly deceived plaintiffs about the possibility of an enhanced plan" because there was no serious consideration at the time of plaintiffs' inquiries (*id.* at 494) - not because there were no misrepresentations made, as respondents infer. *See* Resp. Opp. at 18.

Similarly, in *Hockett v. Sun Co.*, 109 F.3d 1515 (10th Cir. 1997)[3], *Fischer II*, 96 F.3d 1533, and *Wilson v. Southwestern Bell Tel. Co.*, 55 F.3d 399 (8th Cir. 1995), the courts found that statements similar to those alleged here had occurred, but nevertheless held the plaintiffs could not establish their breach of fiduciary duty claims under ERISA because the statements were made prior to "serious consideration."

B. This Court Should Resolve the Conflict Even if the Issue does not Resolve this Case.

Respondents wrongly contend the Ninth Circuit's ruling pertaining to misrepresentations that occur prior to "serious consideration" is not ripe. If the Ninth Circuit is reversed, alleged misrepresentations made before serious consideration will likely be excluded, which could resolve the entire case. Respondents concede alleged misrepresentations were made before collective bargaining began and the Ninth Circuit concluded "serious consideration" might have occurred when Pacific presented its ERB proposal to the Union during collective bargaining. App. A at 10a.

Even if the issue would not resolve the outcome of this case, the Ninth Circuit's holding establishes new law that can be relied upon in future cases. Because that law is contrary to the law of the majority of other Circuits, this Court should grant the writ to resolve the conflict.

Accordingly, the petition for a writ of certiorari should be granted.

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[3] Contrary to respondents' contention, Hockett did not resign before asking if he would be offered a better retirement program. *See* Resp. Opp. at 18. Rather, on several occasions before the effective date of his retirement, Hockett had asked his supervisor and a vice president whether he would receive a better package and was told such a package was unlikely. *Hockett*, 109 F.3d at 1519.

Respectfully submitted,

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